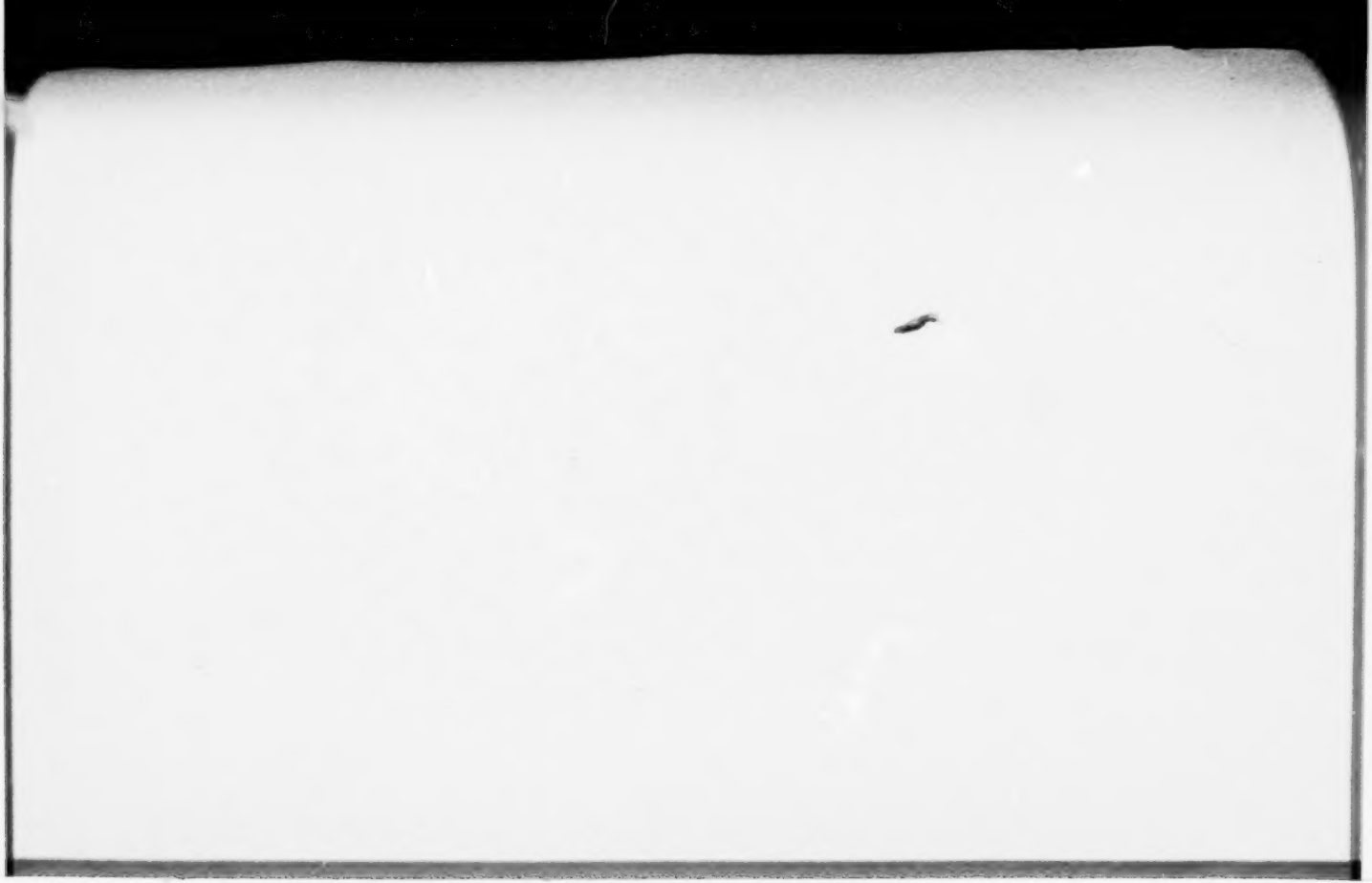

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE SWAN & FINCH CO. *Appellant*,
v.
THE UNITED STATES. } No. 258.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

Statement of Case.

This is a claim for drawback upon imported duty-paid materials used in exported manufactured articles. The imported material was rape-seed oil; the manufactured article was lubricating oil; the exportation consisted of carrying the oil from the port of New York upon steamers engaged in the foreign trade for use on the voyage, without landing in a foreign country. The issue is on the exportation.

The appellant alleges that this is a completed exportation; the United States contends that relanding in a foreign country is necessary to exportation. The court below sustained the latter contention.

The statute under which this claim is presented is section 22 of the act of August 28, 1894 (28 Stat. L. 551), re-enacted in identical words during the period when this claim was originating as section 30 of the act of July 27, 1897 (30 Stat. L. 211). It is as follows:

"That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties:

"*Provided*, That when the articles exported are made in part from domestic materials the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained: *And provided further*, That the drawback on any article allowed under existing law shall be continued at the rate herein provided. That the imported materials used in the manufacture or production of articles entitled to drawback of customs duties when exported shall, in all cases where drawback of duties paid on such materials is claimed, be identified, the quantity of such materials used and the amount of duties paid thereon shall be ascertained, the facts of the manufacture or production of such articles in the United States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either or to the person to whom such manufacturer, producer, exporter, or agent shall in writing order such drawback paid, under such regulations as the Secretary of the Treasury shall prescribe."

The Court of Claims found that duty had been paid upon imported rape-seed oil used by the claimant in manufacturing lubricating oils; that these lubricating oils were placed on board vessels in the port of New York bound for foreign ports and that no proof was furnished of the relanding of said oils in foreign ports. The Treasury Department had fixed a rate of drawback on similar oils relanded in foreign countries and the claimant had been allowed and paid such drawback by the Treasury Department. It was denied in this case because the oils were consumed on the voyage. Such omissions as oc-

curred in complying with the regulations were without fault or negligence on claimant's part and were in general due to omissions by the officers of the Treasury, such as are usually waived upon proof of exportation.

The sole issue between the parties is whether the shipment of the manufactured articles, otherwise entitled to drawback, upon vessels bound for foreign ports and the use of such articles on the vessels without relanding is an "exportation" within the meaning of the statute cited.

Assignment of Error.

The appellant avers that the Court of Claims erred:

I. In not holding that the shipment of the manufactured article containing imported materials on a vessel in the foreign trade for use on the voyage was an exportation.

II. In holding that imported materials used in manufactured articles so shipped and used were not embraced within the provisions of the drawback law.

III. In not rendering judgment for the amount of the duty paid on such imported materials as provided by section 22 of the act of August 28, 1894, and section 30 of the act of July 27, 1897.

Argument.

The statute quoted makes "exportation" the test of the right to drawback. This claim depends upon the definition of the word "exportation" as used in the statute. The Court of Claims holds that "exportation" involves relanding in a foreign country. The appellant maintains that the exportation is complete with departure from this country on a vessel engaged in the foreign trade.

"Exportation" has Two Meanings.

The first source of information for definition of dis-

puted words is the usually received authoritative dictionaries. These contain the following definitions:

Murray's Philological Dictionary:

"EXPORT—verb, *ex*, out, *portare*, to carry.

"1. To carry (things or persons) out of a place; to take away, carry off.

"2. To send out (commodities of any kind) from one country to another.

"EXPORTATION—The action of exporting.

"1. *a.* (General) Carrying out of a place. *b.* The conveying or sending (persons) out of the country.

"2. The sending out (of commodities) from one country to another.

"3. (Quasi-concretely) Something carried out."

Webster's Dictionary:

"EXPORT—To carry or send abroad, or out of a country, especially to foreign countries, as merchandise or commodities in the way of commerce; the opposite of import."

Century Dictionary:

"EXPORT—1. To take or carry away.

"Specifically—2. To send to a distant point, as commodities; send for sale or exchange to other countries or places."

Standard Dictionary:

"EXPORT—To carry or send out or away, especially for trade from one country to another."

The derivation of the word is from the Latin *ex*, out of, and *portare*, to carry. Etymologically its meaning is simply "to carry out of," or "away."

The following law dictionaries recognize both meanings given in the literary dictionaries.

Anderson:

"EXPORT—To carry away or send out of the country.

"EXPORTS—Merchandise sent from one country to another."

Black:

"EXPORT—To send, to take, or carry an article of trade or commerce out of the country. To transfer merchandise from one country to another in the course of trade; to carry out or convey goods by sea."

Other law dictionaries recognize only the meaning implying relanding in a foreign country. The failure of some law dictionaries to recognize the primary meaning elsewhere recognized, proves only the imperfection of these dictionaries, particularly since we hereafter cite adjudicated cases giving this meaning.

These definitions show that the word has two meanings:

(1) Its primary, general or essential meaning—to carry or send out of a place, and

(2) Its secondary, specific or especial meaning—to send out from one country to another.

Of all goods sent out of this country but a small proportion fails to reach a foreign country; the amount consumed or lost at sea is minute in comparison. In ordinary use, therefore, the foreign destination is implied. We claim that, however usual, it is not essential and that here the original and primary definition of the word should be applied to goods carried out of the country on vessels in the foreign trade, although they never reach a foreign country.

Which meaning is to be preferred in this statute is to be decided by finding which is more in accord with the purpose of the statute. This principle is admirably stated in Black on the Interpretation of Laws (p. 56):

"Every statute is to be construed with reference to its intended scope and the purpose of the legislature in enacting it; and where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute.

The Purpose of the Law.

We are fortunately possessed of decisions of this court which state precisely the purpose of the statute.

In *Campbell* v. *United States*, 107 U. S. 407, it is said (p. 413):

"The purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign country—articles which are not sold or consumed in the United States. The linseed in this case was bought abroad and imported for the purpose of being manufactured and the product immediately sent out of the country. The drawback provision was simply a mode of making the linseed so imported and exported without distribution in the country duty free, and we see no gratuity in the case."

To similar effect is the definition in *Tide Water Oil Co.* v. *United States*, 171 U. S. 210, where the court says (p. 216):

"The object of the section was evidently not only to build up an export trade but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries."

The Court of Claims had this statute under consideration in the case of the *Schlitz Brewing Co.* v. *United States* (35 C. Cls. 110), and said (p. 120):

"The true constituents of a system strictly protective must be that the American manufacturer shall manufacture from American products for the American market, and thereby help the American producer as well as himself. But the overproduction of modern machinery has of late years overstocked the home market, and Congress have sought by appropriate legislation to bring foreign

markets within the reach of American manufacturers. To that end the legislative policy has been to allow the home manufacturer to manufacture his articles out of imported materials coming into the country practically duty free."

Applying the purpose of the drawback law, as defined in these cases, to the present case, the question is extremely simple. A vessel engaged in the foreign trade is, so far as concerns the customs laws of the United States, foreign territory. The customs laws take effect at the custom house. Articles of foreign origin may be placed on such a vessel, while it is in a foreign port, and consumed on that vessel while in that port or on the high seas or in a port of the United States, without regard to the customs laws of the United States. A vessel in the foreign trade is open competitive territory, just as much as China or any other foreign country.

It is even more open to world competition than any land because no customs laws can give even to the country whose flag the vessel carries any preference in furnishing supplies to the vessel. It has the distinct advantage, too, of travelling from place to place and thus being able to select a market for purchasing most favorable to itself.

The American manufacturer, in the competition for supplying ships' stores, is placed at a disadvantage by the tariff laws imposing a duty upon materials entering into the manufacture of the articles which he wishes to sell for use on board the vessel. He is in just as unfavorable a position as when competing for a sale to a foreign country. For the purposes of a drawback law, which seeks to place the American manufacturer in a position equal to that of his foreign competitor in those markets where the protective tariff laws of the United States can give no advantage to the American, a ship in the foreign

trade occupies the position of a foreign country; it is open, not protected, territory.

The application of the law to the trade in ships' stores, as maintained by the claimant, is thus clearly within the purpose of the law. We have already seen that the primary meaning of the word used amply warrants such an application. When spirit and letter of the statute unite on one construction, why should another be sought?

Judicial Definitions.

The words "export" and "exportation" have often been judicially interpreted and it is said that the decisions have finally adjudicated these words in a meaning conclusive against this claim. We shall find that the American use of the words excludes the domestic trade but includes all foreign commerce whether between the United States and foreign ports or the United States and vessels engaged in the foreign trade.

In discussing the cases, we shall divide them into classes: (1) those where the precise distinction material to this case arose, and (2) those where this issue did not arise but the definition was incidental to some other discrimination. A very different importance attaches to these two classes. The former are judicial authorities; the latter have no more force than *obiter dicta* in their application to the distinction here discussed.

"We take it to be a sound principle," says Justice Miller in *Woodruff* v. *Parham* (8 Wall. 138), "that no proposition of law can be said to be overruled by a court which was not in the mind of the court when the decision was made."

The question here involved is: Does exportation include the carrying away by a foreign bound vessel of goods to be consumed on the voyage? This involves the question: Is exportation complete on leaving the port

or is relanding in a foreign country essential to its completion?

Definitions of the words "export" and "import," which would seem to require a foreign country as the place of destination on the one hand, or the place of origin on the other, are not to be received as authoritative in this case unless there was distinctly brought before the court in making the definition, either the question whether articles lost or consumed at sea are included within the term "export" or whether the "exportation" was completed when the goods left the port.

Cases Involving This Question.

In *Sampson* v. *Peaslee* (20 Howard, 571), the meaning of the words "the period of exportation" was in question in a statute requiring the ascertainment of duty by the value of the goods at this period. The court held that they meant "the date of the vessel's sailing." The language of the court is as follows:

"This court decided, in the cases of *Greely* v. *Howard*, 10 How. 225, and in *Maxwell* v. *Griswold*, 10 How. 242, in the year 1850, before the act of 3d March, 1851, had passed, that under the sixteenth and seventeenth sections of the tariff act of 30th August, 1842, 5 Stat. at L. 563, the value of merchandise at the *time of procurement* is to be ascertained, not its value at the time of *exportation*. Congress, with these differences in view, and particularly in consequence of the decision of this court in the cases just before cited, passed the act of March 3d, 1851. This court in 1855, in *Stairs et al.* v. *Peaslee*, 18th Howard, 521, 524, 525, in considering the act, uses this language, which is decisive of the time when the value of the goods subject to an *ad valorem* duty is to be estimated: 'The language of this act of Congress is general, and embraces all importations of goods that are subject to an *ad valorem* duty, and directs that their value shall be estimated and ascertained by the wholesale price at the period of exportation

to the United States in the principal markets of the country from which they are imported. The time and the place to which the appraisers are required to look when making their appraisement are both distinctly specified in the law, the time being *the period of exportation*, and the place the country from which they were imported into the United States. It makes no reference to their value in the country of production or the time of purchase. And as there is no ambiguity in the language of the act, and it embraces all goods subject to an *ad valorem* duty, the court would hardly be justified in giving a construction to it narrower than its words fairly import.' Though this extract was written with reference to the first point certified in that case, which was, whether the act of the 3d March, 1851, repealed so much of all former laws as provided that merchandise, when imported from a country other than that of production or manufacture, should be appraised at the market value of similar articles at the principal markets of the country of production and manufacture 'at the period of the exportation to the United States,' the court adds, that the law, taken by itself, will admit of but one construction; and that is, the appraisement must be made by the value of the goods in the principal markets of the country from which they are exported, *at the time of such exportation to the United States.*

"The case of *Stairs* v. *Peaslee*, considered in connection with what this court had decided under the revenue acts in *Greely* v. *Howard*, and in *Maxwell* v. *Griswold*, 10 How. 242, shows, whatever may have been the practice in computing the time for the assessment of duties, that this court viewed the act of the 3rd March, 1851, as having fixed the rule to be the time or date of the exportation, as that might be shown by the day of the vessel's sailing from the foreign port to the United States. Indeed, from the phraseology of the act, without reference to preceding acts upon the same subject, or what had been their construction, the same conclusion must be reached."

In *Irvine* v. *Redfield*, 23 How. 170, this court directly follows the foregoing case, saying that it was then decided (p. 172):

"That the day of the sailing of a vessel from a foreign port is the true period of the exportation of the goods; and that the Secretary of the Treasury had given a proper interpretation of the statute, in directing it to be done on the market value of the goods imported on the day of the sailing of the vessel."

The conclusion of the court was:

"That the duties upon foreign merchandise are to be computed on their value on the day of the sailing of the vessel from a foreign port."

To the same effect is *Greely* v. *Thompson*, 10 How. 223.

The period of exportation, these cases hold, was the time when the goods left the foreign port, not the time when they arrived here. The exportation was complete when the goods were carried away. Applying that principle to this case it must be said that the exportation was complete when this oil left New York on a vessel in the foreign trade. No subsequent relanding elsewhere was needed to complete it.

In *Forman* v. *Peaslee* (9 Fed. Cas. 452), the court had to ascertain the market value of an import "at the period of exportation to the United States." Certain iron had been transported from Wales to Liverpool, where it was laden on board packet ships and brought to Boston. Justice Curtis used the following language in deciding this case (p. 453):

"The natural meaning of the words 'period of exportation' is termination of exportation. The period of exportation is that point of time when the act of exportation is complete. The subject-matter of the statute is the appraisal of goods exported from a foreign country and imported into the United States. So that the inquiry in this case is, at what point of time was the exportation of this merchandise from the foreign country, England, complete? My opinion is, when it left Liverpool."

It is true that in this case the learned judge discussed the word "exportation" and said that in general it "covered only cases where property was not merely sent out of one port to another of the same kingdom, but carried to a foreign country," but the principle decided was that the exportation was complete when the goods left England. This is the principle governing this case. That the learned judge had not before him the condition which occurs here, does not detract from the force of the principle applying to this case, but it explains his failure to observe this distinction.

The complement of the present question is presented in several cases. In *Marriott* v. *Brune* (9 How. 619), it was held that where a portion of a cargo of sugar and molasses was lost by leakage on the voyage, duty should be exacted upon the quantity which arrived here and not upon the quantity shipped. The court there said (p. 632):

"The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is, what is *imported*—for nothing is imported till it comes within the limits of a port. * * *

"As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom-house; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufacturers; and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more." * * *

"It is also the quantity actually received here by which alone the importer is benefited. It is all he can sell again to customers. It is all he can consume. It is all he can re-export for drawback."

This case was quoted and followed in *Lawder* v. *Stone* (187 U. S. 281), where it was held that fruit, good when

shipped, but decayed and worthless on arrival, is not "goods, wares and merchandise imported into the United States."

The same principle is involved in the decision in *American Sugar Refining Co.* v. *United States* (181 U. S. 610). Sugar was exported from Brazil for importation into the United States. On leaving Brazil its value per pound was less than its value per pound on entry into the United States. It was held that the importation occurred when it came into the United States and not when it left Brazil. The essential to importation is entrance just as the essential to exportation is exit.

In the present case we are contending that the exportation occurs when the goods leave the port, and not afterward; in the cases cited, it is held conversely that the importation occurs when the goods arrive in the port, and not before.

It must be borne in mind in reading the decisions in relation to imports that the language uniformly used in the laws imposing tariff duties is articles "imported from foreign countries." See Revised Statutes, section 2503, act of October 1, 1890, 26 Stat. L. 567; act of August 27, 1894, 28 Stat. L. 509; act of July 24,1897, 30 Stat. L. 151. This differs from the language of the drawback law where the word used is "export" or "exportation" without the limitation to a foreign country, a difference which, in this case, we insist is material.

In one English case the exact question arose which occurs here. In *Muller* v. *Baldwin*, 52 L. J., Q. B. (N. S. Vol. 43), part 2, p. 164, the question was whether coal taken on board a vessel for use on the voyage was exported. Authority was given by statute to levy tolls on coals "exported from the port" by an act passed in 1872. It was shown that under preexisting statute, from 1840 to 1870, no dues were levied on such coal and no attempts

made until ten months after the act of 1872 was passed. The entire opinion is as follows:

"The question raised by this appeal is whether coals taken out of the port of Newcastle in a foreign steamer for the purpose of consumption on board in the course of a foreign voyage are liable to the coal dues of one penny per ton granted to the Tyne Improvement Commissioners by 'The Tyne Coal Dues Act, 1872, on all coals exported from the port of Newcastle. The learned judge of the county court considered that, having regard to the usage of the corporation, while the coal dues belonged to them, of treating coals taken on board for consumption as exempted from duty, the term 'exported' must receive a qualified interpretation and be taken to mean coals exported for the purpose of commerce as distinguished from what are called 'bunker coals,' that is, coals taken on board for the purpose of consumption on the voyage. We agree as to the reasonableness of making a distinction between coals taken away for sale and coals taken for the necessary use of the vessel, but we are constrained to differ from the learned judge in his construction of the act.

"There is nothing in the language of the act to show that the word 'exported' was used in any other than its ordinary sense, namely, 'carried out of the port,' and considering how easily and how extensively the privilege of storing for use may be abused, and what quantities may be carried away under the name of 'bunker coals,' we think that if it had been intended to exempt from duty coals taken on board for fuel, some limitation as to quantity would have been imposed. Nothing would have been easier than to insert a provision to that effect. We can not, however, speculate upon the intentions of the legislature, which are neither expressed in terms, nor conveyed by implication. Our duty is to interpret the words of a statute according to their plain and grammatical meaning, when, as in this case, they are not controlled by anything found in the context. Construing the words of the act upon this principle, we feel bound to hold that coals carried away from the port not in a temporary excursion, as in a tug or pleasure boat, which intends to return with more or less of the coals on board, and which may be re-

garded as always constructively within the port, but taken away for the purpose of being wholly consumed, beyond the limits of the port, are coals 'exported' within the meaning of the Act.

"We therefore give judgment for the appellant."

We note particularly here the statement of the court that "carried out of the port" is the "ordinary sense" of the word "exported."

We shall see hereafter that in the American use of the word "export," for reasons growing out of our complex governmental system, domestic commerce is excluded. This and another English case hereafter cited recognize the word in its primary and broad sense. We do not cite this case as authority for the use in American statutes of the word "export" in a domestic sense. Its value in the present case is that no discrimination is made in the use of the word "export" between goods carried to another port and those consumed on the voyage. There is nothing which makes this principle inapplicable in the definition of this word in the statutes of the United States.

These are all the cases where the point decided is the point which actually arises here. Whenever the question was clearly presented for judicial decision, it was uniformly held until the decision of the Court of Claims in this case that exportation was complete upon leaving the port and that relanding in a foreign country is not an essential of exportation.

Cases Not Involving This Distinction.

Numerous cases are found where the words "export" and "exportation" are discussed without distinct reference to the point here involved whether the exportation is complete on leaving this country.

We shall find the American cases establish two limita-

tions upon the use of the word "export" in the Constitution and in revenue statutes:

(1) It is not used in reference to domestic commerce, but always in relation to foreign commerce;

(2) Exportation in federal statutes implies an intent of permanence.

"Exports" in the Constitution.

Several cases in this court have laid down the principle that in the Constitution the word "export" is used in relation to foreign commerce and not inter-state or domestic commerce.

Brown v. *Maryland*, 12 Wheat 419, arose under that provision of the Constitution which declares:

"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The court decided that a tax levied by the State of Maryland on importers selling foreign articles by wholesale was a duty on imports. The argument for the State of Maryland was that this was not a tax on an import, but a tax upon an article which, having already come into the State, had ceased to be an import. Answering this argument the court supposed that Congress, forbidden by the Constitution to lay a tax on articles exported from any State, should attempt to levy a duty on merchandise found in vessels after they had left the country. This illustration was used (12 Wheat. 445):

"Or suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out

of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country."

The question suggested by Chief Justice Marshall is, whether the prohibition to tax exports can be evaded by taxing them after they had left the country. He says that this would be an outrage. He applies it to importation and says that equally goods imported can not be taxed unless by removal from their original packages they have become a part of the general merchandise of the State. It is not there denied that the importation is complete when the property comes into the State, or that the exportation was complete when the vessel left. It is simply said that a constitutional prohibition shall not be evaded by a transparent device. That does not involve the present question where the completion of the exportation is the immediate issue.

Chief Justice Marshall, indeed, in his opinion (p. 438) says that an article may be an export when selected for exportation even before it is laden and this view was followed in *Clarke* v. *Clarke* (5 Fed. Cas. 943; 3 Woods, 408), where a state tax was declared void as a duty on exports when levied upon goods awaiting exportation. This goes further than our present contention.

In *Woodruff* v. *Parham*, 8 Wall. 123, the question arose whether the provision of the Constitution forbidding the levying by the State "of any imposts or duties on imports or exports" rendered unconstitutional a tax levied by the State of Alabama on auction sales of goods in their original packages brought in from some other State. The court held that the word "imports" in this clause of the Constitution had no application to inter-state commerce, saying (p. 136):

"It is not too much to say that, so far as our research has extended, neither the word export, import, or impost is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant."

Here it is plain that the mind of the learned judge was fixed upon the discrimination between inter-state commerce and foreign commerce. It is not fair to him to say that he decided another question which he had not in mind, particularly in the face of the statement already quoted from the same opinion, (*ante*, p. 8) disclaiming such use of judicial expressions. The question here presented, whether a shipment upon a vessel engaged in a foreign trade of goods for consumption on the vessel, is an exportation, was not in the mind of the learned judge. Yet he used language fairly including it. The commerce in the present case, while not with a foreign country, is "foreign commerce," because carried on with vessels engaged in commerce with foreign countries and more particularly because the vessels are foreign to our revenue laws.

In *Brown* v. *Houston*, 114 U. S. 622, a law of Louisiana taxed coal brought into the State from Pennsylvania and sold from the vessel in which it was brought. It was objected that this was a taxation by the State upon imports. This court held that the clause of the Constitution referred to does not relate to inter-state, but to foreign, commerce, and after quoting the two preceding cases in full, thus summarized the decision in the case of *Brown* v. *Maryland*:

"This court, however, after an elaborate examination of the question, held that the terms 'imports' and 'exports' in the clause under consideration had reference to goods brought from or carried to foreign countries alone, and not to goods transported from one State to another."

The learned judge had in mind the distinction between inter-state and foreign commerce. The distinction here drawn was not before him. Commerce with vessels in the foreign trade is foreign, not domestic, commerce. The words "foreign countries" were inadvisedly used instead of "foreign commerce."

Coming now to *Dooley* v. *United States*, 183 U. S. 151, we find that this court has held that article 1, section 9 of the Constitution, "that no tax or duty shall be laid on articles exported from any State," does not relate to articles sent from a State of the Union to Porto Rico, a domestic territory. The decision was rested upon the preceding cases. It is true that the court used this language (p. 154):

"It follows, and is the logical sequence of the case of *Woodruff* v. *Parham*, that the word 'export' should be given a correlative meaning and applied only to goods exported to a foreign country."

But did the learned judge in using the words "exported to a foreign country" to make a distinction from domestic commerce, mean to decide the present question and hold that a shipment of goods on a steamer in the foreign trade for consumption on that steamer was not an exportation? This by-path of foreign commerce was not in mind.

The case of *Fairbank* v. *United States*, 181 U. S. 283, holding that a stamp on a foreign bill of lading is a tax on articles exported, has no bearing upon the question here at issue. The court there discussed some of the cases here cited without reference to the point involved in this case.

In an English case (*Stockton Railway Co.* v. *Barrett*, 11 Clark & Fin. 600) where the question arose whether "exportation" in a statute included domestic trade, it was defined in its broader meaning of carrying out of port. The court said:

"The first question relates to the meaning of the terms 'shipped for exportation' in the Stockton and Darlington Railway Act; whether they were confined to exportation to foreign countries or included shipments of coals to be carried coastwise to other parts of the kingdom. There is not, I think, any reason for adopting the narrower interpretation. The terms are large enough to comprehend both, and, if it was a case of doubt, the rule is in acts of this nature to adopt the construction most beneficial to the public. I may further observe that from the nature of the article the home market would probably have been at least as much in the contemplation of the legislature as the foreign."

Here no constitutional question affected the interpretation, but the case was decided according to the object of the statute. This we claim should be the decisive principle here.

When the question has been presented to this court for discrimination between foreign commerce and interstate or other form of domestic commerce, the court has used language appropriate to that great question. It has not borne in mind the proportionately minute amount of foreign commerce which may be carried for consumption on vessels engaged in the foreign trade. Expressions used in the discussion of the larger question without regard to the lesser issue, should not be treated as rendering *stare decisis* the question of slight general importance now arising in this case.

A striking illustration of the fact that this particular question is quite outside the view of the judges when considering the general subject of foreign commerce, is afforded in the case of *Campbell* v. *United States* (107 U. S. 413), the leading case upon the application of the drawback law. We have already quoted from it (*ante*, p. 6) on this subject. A single sentence contains one expression absolutely favorable to the definition upheld by the

appellees, and another expression equally favorable to the appellants' definition.

The words following in italics approve the appellants' definition:

"The purpose of the drawback provision is to make duty free imports which are manufactured here and then returned whence they came or to some other foreign country *articles which are not sold or consumed in the United States.*"

The words following in italics approve the appellees' definition:

"The purpose of the drawback provision is to make duty free imports which are manufactured here and *then returned whence they came or to some other foreign country*— articles which are not sold or consumed in the United States."

This illustrates the futility of quoting as authority on a particular question the expression of a judge who was making a general statement. The Court of Claims, with a certain naivete, says of this quotation (Rec. p. 12): "But for the concluding part of the paragraph the decision would cover this case." We may add that but for the language preceding the concluding part of the paragraph, the opposite is equally true.

"Exportation" Involves Permanence.

It is also generally held that, where goods leave the United States only temporarily, the owner intending to reland them in this country, there is no exportation, because the intent is absent. The courts hold the purpose of permanent absence essential to the exportation.

In the case at bar, that intent exists, since there was no intention to return the goods, but they were consumed on the voyage.

In *United States* v. *The Forrester*, 25 Fed. Cas. 1147; Newb. 81, the question was whether importation occurred where goods were laden at one American port on a vessel bound for another American port which stopped at a Canadian port for further cargo, *en route*. It was held that there was no importation into the United States, this decision being based on the ground that "export" and "import" in the revenue laws are both used in a permanent sense. The court never had before it the discrimination here involved. That was quite outside its consideration. Yet in the discussion, the broader meaning of "export" is recognized (p. 1152):

"We 'import' teas from China, wines from France. We 'export' cotton, tobacco, pork and wheat The one term signifies etymologically, 'to bring in,' the other 'to carry out.'"

In *Kidd* v. *Flagler*, it was held below (54 Fed. Rep. 67) that goods taken out of the United States even with a purpose to return them were exported, but the court above (78 Fed. Rep. 341) held that no exportation occurred within the sense of § 3330, Revised Statutes, because the statute itself made an intentional relanding criminal. The decision of that case was on the particular statute involved. The term "exportation" was given the meaning required by that statute. This is not at all inconsistent with the contention made in this case. It is striking that in the very definition of "exportation" made by the court below (54 Fed. Rep. 369) the court cites two dictionary meanings of the term "export," one of which ignores the question of destination and the other includes it:

"The dictionary meaning of the term 'export' is as follows:

"'To carry from a state or country, as wares in com-

merce.'—Webst. Dict. 'To send goods and merchandise from one country to another.'—1 Bouv. Law Dict. 502; 1 Rap. & L. Law Dict. 487."

Thus it is seen that the court never had in mind the discrimination which is the very issue in the present case.

The court above recognizes the broad meaning of the word "export" for which we contend in its definition quoted by the Court of Claims (rec. 11):

"Ordinarily goods are exported when they are carried out of the country for the purpose of being transferred to a foreign situs. The intent characterizes the act and determines its legal complexion."

"A foreign situs" is the essential to export, not a foreign country, as is sometimes inadvisedly said. In the present case a vessel in the foreign trade is a foreign situs as much as a foreign country, since it is equally foreign to our custom laws.

Kennedy v. *United States*, 95 Fed. Rep. 127, is in the same line, holding that there is no exportation where bags are carried during successive voyages from one side of the ocean to the other, alternately filled and emptied when landed on either side. This likewise does not affect this case since here the goods were consumed on the voyage.

The Result of the Cases.

The cases may be thus summarized:

(1) When the issue in this case—"Is exportation complete on leaving the port?" has been presented to courts, the answer has been that it is, if the intent exists to keep the goods out of the country.

(2) The constitutional and statutory use of the word "export" relates to foreign, as distinguished from domestic, commerce.

(3) Where the issue in this case has not been under

consideration courts have often used the phrase "commerce with foreign countries" as equivalent to "foreign commerce."

The Statute and the Constitution.

"Framed pursuant to the paramount law, the statutes must be construed with the Constitution and all together as one law."

This correct principle, forcibly stated by the Court of Claims in the opinion below (Rec. 10), is applied against the claimant; rightly viewed, it is greatly in claimant's favor.

The drawback law in its relation to this case is closely connected with two frequently quoted paragraphs of the Constitution. By article 1, section 9, the power of Congress is abridged in regard to exports:

"No tax or duty shall he laid on articles exported from any State."

By section 10 of the same article:

"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports."

These provisions relate to external and not to domestic commerce, we have seen. Can it be doubted, that if the State of New York attempted to lay a duty on the oils shipped out of the port of New York for use on vessels in the foreign trade, the oil refiners of New Jersey would successfully invoke the protection of the Constitution? Congress is equally forbidden to lay any such tax.

It is true that this precise question has never been determined here, but the reason for forbidding to either State or United States the right to tax exports intended for foreign ports applies to those intended for ocean consumption. That reason is stated by Madison as quoted

by Justice Miller in *Woodruff* v. *Parham* (8 Wall. 135), as follows:

"Some States export the produce of other States. Virginia exports the produce of North Carolina; Pennsylvania those of New Jersey and Delaware; and Rhode Island, those of Connecticut and Massachusetts. The exporting States wished to retain the power of laying duties on exports to enable them to pay expenses incurred. The States whose produce was exported by other States, were extremely jealous lest a contribution should be raised of them by the exporting States, by laying heavy duties on their own commodities."

No distinction can be made between forbidding the State of New York or the United States to tax oil manufactured in New Jersey when exported from the port of New York to England, and that same oil when exported from the same port for use on a vessel engaged in the English trade. The constitutional prohibition against taxation of exports must therefore apply to any tax on oil shipped for consumption on the voyage as in this case.

The shipments included in this case being thus within the constitutional protection as exports, the statute must be construed with the Constitution as one law and in the same extensive meaning.

The drawback law while primarily passed as a complement to the protective system is also intended to carry out the principle laid down in these articles of the Constitution. Exports, these say, are to be free from tax. Manufactured articles, when exported, are, the statute says, to be made free from import taxes on their materials. Thus the export becomes entirely free from tax. There is no constitutional obligation to do this, but it is within the constitutional principle.

The purpose of the Constitution, fully developed in the

statute, is that articles leaving this country in the course of trade shall not be taxed. No discrimination can be made in enforcing the Constitution between goods exported for use on the voyage and for relanding in a foreign country. The drawback statute, designed to carry to its fullest extent the spirit of this constitutional provision, should be enforced as broadly and the imported materials made duty free whether the export is for use on the ocean or on foreign soil.

Former Legislation.

Prior legislation on this subject is all consistent with the meaning of the word "exportation" in this statute as demanded by the claimant. Some of the statutes are referred to in the opinion of the Court of Claims (Rec. p. 9).

The first drawback act of Congress was that of March 2, 1799, section 75 (1 Stat. L. 680), which appears, modified in some important particulars, as sections 3015, 3016 of the Revised Statutes. The act is as follows:

"*And be it further enacted*, That a drawback of duties, as prescribed by law shall be allowed and paid on all goods, wares or merchandise imported into the United States, in respect to all such goods, wares and merchandise, whereupon the duties shall have been paid, or secured to be paid, as, within twelve calendar months after payment made, or security given, shall be *exported to any foreign port or place*, other than the dominions of any foreign State immediately adjoining to the United States, either from the district of original importation, or from certain other districts; and all duties, drawbacks and allowances which shall be payable, or allowable, on any specific quantity of goods, wares or merchandise, shall be deemed to apply in proportion to any greater or lesser quantity: *Provided*, that no goods, wares, merchandise imported, shall be entitled to a drawback of the duties paid, or to be secured thereon, unless the duties so paid or secured

thereon shall amount to fifty dollars at least; nor unless they shall be exported in the original casks, cases, chests, boxes, trunks or other packages, in which they were imported, without diminution or change of the articles which were therein contained, at the time of importation, in quantity, quality or value, necessary or unavoidable wastage or damage only excepted."

Section 81 of this act makes provision for a form of bond to be given upon the reshipment of imported goods for the benefit of drawback under this statute. The condition of the bond is as follows (1 Stat. L. 689):

"The condition of this obligation therefore is such, that if the aforesaid recited merchandise, or any part thereof, *be not relanded in any port or place within the limits of the United States*, and if the certificates and other proofs required by law of the delivery of the same at the aforesaid port of *or at any other port or place without the limits of the United States*, as aforesaid, shall be produced at this office, within from the date hereof, then this obligation shall be null and void, but otherwise to remain in full force and virtue."

Attention is asked to the fact that the bond is discharged if the goods are not relanded in the United States and are delivered at any "port or place without the limits of the United States." The same section further provides (1 Stat. L. 690) for certificates to be given by the consignee to the consul or agent of the United States and the two principal officers of the vessel. Then it proceeds as follows (p. 690):

"And in cases of loss by sea, or by capture or other unavoidable accident; or when, from the nature of the trade, the proofs and certificates before required are not, and can not be procured, the exporter or exporters shall be allowed to adduce to the collector of the port of exportation such other proofs as they may have, and as the nature of the case will admit; which proofs shall, with

a statement of all the circumstances attending the transaction, within the knowledge of such collector, be transmitted to the comptroller of the treasury, who shall have power to allow a further reasonable time for obtaining the proofs aforesaid; or if he be satisfied with the truth and validity of the proofs adduced, to direct the bond or bonds of such exporter or exporters, to be cancelled."

We submit that under this, the original drawback law, a shipment of foreign goods on a vessel engaged in the foreign trade for the purpose of use on that vessel, was included within the benefit of the drawback because the exportation, while not for a foreign port, was for a foreign place, viz., the high seas. The condition of the bond required by the statute was that the goods "be not relanded in any port or place within the limits of the United States," and a general provision was made that where the certificates obtainable upon relanding "could not from the nature of the trade" be procured, such other proofs might be adduced as the nature of the case would admit.

It is difficult to see how any law could be better made to include such a case as the present or more fully designed to accomplish the general purpose of the act to free from duty imported goods brought into the United States and taken out again in the condition in which they were imported, not for relanding but for use where the customs laws of the United States have no authority.

The drawback law was not materially modified from that time until the act of August 5, 1861. Section 4 of that act (12 Stat. L. 293) is as follows:

"That from and after the passage of this act, there shall be allowed, on all articles wholly manufactured of materials imported, on which duties have been paid *when exported*, a drawback, equal in amount to the duty paid

on such materials and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury: *Provided*, that ten per centum on the amount of all drawbacks, so allowed, shall be retained for the use of the United States by the collectors paying such drawbacks, respectively."

With some unimportant changes this is continued as Revised Statutes, section 3019.

In carrying section 75 of the act of 1799 into the Revised Statutes, a change took place in its terms, of material import in the bearing of the act on this case, for the phrase "to any foreign port or place" was abbreviated to read "to any foreign port."

The form of bond was not carried into the Revised Statutes, but the Secretary of the Treasury has preserved this literally in the various editions of the customs regulations from that date to this, applying it with the slightest necessary changes even to the drawback on manufactured articles under later laws. See the Customs Regulations of 1892, now in force, articles 746 and 762. The portion of section 81, above quoted, dispensing with certificates of relanding, was carried into the Revised Statutes as section 3047.

The difference between these two acts is that the first relates to goods exported in the condition in which imported; the second to "articles wholly manufactured of materials imported."

A further extension of this principle was made in section 25 of the tariff act of October 1, 1890 (26 Stat. L. 617) re-enacted as section 22 of the act of August 28, 1894 (28 Stat. L. 551) and section 30 of the act of July 24, 1897 (30 Stat. L. 211).

Under these acts a drawback was paid on *exportation* of imported materials "used in the manufacture of articles manufactured or produced in the United States" without

regard to the manufacture being wholly of imported material (see this section, *ante* p.)

The close relation of the drawback system to the protective tariff system is seen by recalling that the drawback law of 1861 was a part of the act known as the Morrill act and that of 1890 as the McKinley act, the two acts bearing the names of the most distinguished advocates of the protective system.

The earliest drawback act, that of 1799, uses the words "exported to any foreign port or place." The second act says "exported." The three later acts say "on exportation." By error of the revisers, the first act was re-enacted to read "to any foreign port." All the original acts alike are broad enough to include the present case where the goods were consumed on the high seas—a foreign place, but not a foreign port. It is only in the revision that a limited term is by error introduced which would exclude the shipment of stores for use on the voyage.

No sound rule of statutory construction can import into the third and later acts the restrictive term not used in the first act, but by accident finding lodgment in the revision. Rather must it be supposed that Congress in extending the drawback system to manufactured articles deliberately used broad terms to make the system as extensive as the needs of manufactures and commerce. On no proper principle of interpretation can it be said that the broad words of later statutes can be restricted by the narrow term of a single accidental enactment.

Another system designed to make free of tax imports manufactured, but not consumed, in the United States is the manufacturing bonded warehouse system in its various forms under different statutes. Its object is the same as the drawback system. Throughout the legislation relating to that system from its origin in the act of October 1, 1890, the words "export" and "exportation" are used without any words of limitation to foreign countries.

Thus the act of 1890, section 10 (26 Stat. L. 614), provides for the manufacture of articles composed of domestic spirits "intended for exportation" without payment of internal revenue tax.

Section 14 of the same act (26 Stat. L. 615) provides for machinery imported into the United States for repair "to be withdrawn and exported" free of duty. This is re-enacted in section 13 of the act of August 28, 1894 (28 Stat. L. 550), and section 19 of the act of July 24, 1897 (30 Stat. L. 209).

Under section 24 of the act of 1890 (26 Stat. L. 617), imported metals may be smelted without payment of tax if "intended to be exported." This is re-enacted in section 21 of the act of 1894 (28 Stat. L. 551), and in section 29 of the act of 1897 (30 Stat. L. 210).

The act of July 24, 1897, section 15 (30 Stat. L. 207), provides further for bonded manufacturing warehouses, re-enacting section 9 of the act of 1894 (28 Stat. L. 548).

The absence from all these acts of any provisions requiring the exportation to be "to a foreign country" as a condition of freedom from tax is a complete answer to any inference from the accidental inclusion in the Revised Statutes of the restrictive term.

The drawback system, a corollary of the protective system, designed to make domestic manufactures of imported materials duty free for foreign markets, has now assumed great breadth and scope. The construction of the acts relating to it should be characterized by the same broad spirit as their enactment.

Departmental Construction.

It is found as a fact that bills of lading are required by the regulations of the department, but none could be furnished in this case because none are issued for ships' stores. The Court of Claims (Rec. 9) admits that all de-

partmental regulations requiring bills of lading, if not authorized by law, would be void (*Campbell* v. *United States*, 107 U. S. 413; *Morrill* v. *Jones*, 106 U. S. 466; *French* v. *Fyan*, 93 U. S. 169; *Railroad Company* v. *Smith*, 9 Wall. 95), but says that this is a departmental construction entitled to very great respect.

The act of 1861, embodied in Revised Statutes, § 3019, was very limited in its scope and we are not able to find until November 22, 1889, any decision of the Treasury Department bearing upon the question of drawback of ships' stores. On that date, it appears from the official publication, "Synopsis of Treasury Decisions," No. 9733, that the following decision was made.

"The Department being informed that in some cases sugar and cordage intended for use on departing vessels have been entered for drawback as articles exported, it is hereby directed that upon all exportations of sugar, in less quantities than five barrels or ten half-barrels, and of cordage on which the amount of drawback is less than $100, the person issuing the bill of lading shall be required to state thereon that from his personal knowledge the sugar or cordage therein described is not intended to be used on the outward voyage, and that the bill of lading has been issued therefor in good faith to secure the transportation of said sugar or cordage to the port of destination, and its unloading and delivery at said port."

This weakens the argument from continued contemporaneous construction because it shows that the practice under § 3019 had not been uniform. The Secretary, in his decision, stops an existing practice, which had been followed for how many years we do not know. That this practice was consistent with sections 75 and 81 of the act of 1799 and the conditions of the bond prescribed by that statute and the Treasury Regulations has been already seen.

The act of October 1, 1890, was the first act extending

the drawback law to a widely varied class of articles and the first decision under this act was that of December 28, 1892, published in the same official publication as No. 13,563. This petition was filed in January, 1898, covering entries made in 1895, 1896, and 1897. There was thus no very extensive official construction of the act of 1890 and its successors of 1894 and 1897. But even here the Treasury Department admitted exceptions which, in effect, confessed the principle for which we are contending.

Treasury Decision 14,190, of July 14, 1893, related to a cargo of case oil shipped for India. Drawback was paid on the tin cases. The vessel reached the port of St. Thomas in a disabled condition and returned to the United States with the tin cases on board, damaged and valueless. The drawback, in accordance with the practice, had been paid on the departure of the vessel, under bond to produce a relanding certificate. The collector, upon reimportation of the damaged cases, insisted upon payment of duties equal to the drawback originally allowed (Act of October 1, 1900, par. 493, 1 Supp. R. S. 848). The decision of the Department against this was in the following terms:

"The tin cases which were brought back by the disabled vessel in this instance are represented to be in such condition as unfits them for further use. Indeed, the owner offers to assist in their total and final destruction, and says they would not pay for the costs of sale. Their exclusion from the markets of this country is as complete as if they were landed upon a foreign shore or sunk in mid-ocean. They no longer represent the commodity which was the subject of drawback."

Here was an exportation without importation to a foreign country, the very principle now contended for.

The Treasury Department has applied section 3047, Revised Statutes, taken from section 81 of the act of

March 2, 1799, to all drawbacks, whether under the acts of 1799, 1861 or the later series and has cancelled bonds on proof of "loss at sea." All that is asked here is to apply another provision of section 3047, Revised Statutes, and allow the drawback on proof of the consumption of the exported goods on the vessel, since "from the nature of the trade the proofs and certificates before required are not, and cannot be procured."

Having shown that the practice varied up to 1889; that but a few years after the act of 1890 was passed this question was raised; that in 1893 the principle was admitted in claims upon damaged goods, and that the principle has been uniformly applied in reference to goods lost at sea, the argument from continued contemporaneous construction becomes of very slight weight.

Analogous Words.

An important and interesting light upon the meaning of the words "export" and "import" is thrown by the undoubted meaning of the corresponding words "emigrant" and "immigrant." The word "emigrant" requires a country of departure and usually implies a country of arrival. The word "immigrant" requires a country of arrival and usually implies a country of departure. Thus an emigrant usually becomes an immigrant and an immigrant has usually been an emigrant. This is not always true. An emigrant dying at sea never becomes an immigrant. A baby born at sea becomes an immigrant although he was never an emigrant.

The distinction to be drawn here as in the case of the words "export" and "import" is the distinction between the necessary quality of the terms and their usual incidents. It is this discrimination that we ask the court to make in this case and hold that the oil which left the United States was none the less an export from the United

States although it never became an import to a foreign country.

Conclusion.

An Unreasonable Result Avoided.—The claimant could have obtained this drawback by shipping the oil to England for sale there. Once there, it could have been sold to the very steamers which actually used it and then been used by them. Is it reasonable to suppose that Congress meant to require this circumlocution by American manufacturers, with consequent increase of expense, when shipment as ships' stores in the foreign trade is within a well-recognized meaning of the word "exportation"?

The Statute's Purpose Accomplished.— The question is: Do the words of the statute warrant payment of drawback under such conditions? It is clear that they do. The primary and well-recognized meaning of the words "export" and "exportation" permit the statute, with strict regard to its terms, to be read with a meaning which will give the relief here asked, directly in line with the general object of the law. There should then be no hesitation in giving the words this interpretation in preference to one which limits the remedial purpose.

Constitution and Statute Harmonious.—The Constitution forbids taxation of "exports"; the reason of the constitutional prohibition extends to such a shipment as here made, as well as to shipments to foreign countries. There should be a like construction of Constitution and statutes recognizing the shipment and use here as within the protection of both.

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